California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

From: Jody Feldman, Staff Counsel
Luisa Menchaca, General Counsel

Subject: Advertising Disclosure Regulations: Pre-notice Discussion Regarding Sections 84501-84511; (Proposed regulations 18450.1-18450.5; 18450.11, and proposed amendment to regulation 18402.)

Date: October 25, 2001

I. INTRODUCTION.

This memorandum concerns the second pre-notice discussion of proposed regulations interpreting Government Code sections 84501-84510[1]. In addition, it addresses the first pre-notice discussion of section 84511, as amended by Senate Bill No. 34 (2001-2002 Reg. Sess.).

At the September 2001 Commission meeting, the Commission considered many issues, made several preliminary decisions, and provided guidance on numerous decision points.[2] The regulatory language contained herein reflects the Commission's directives.

- The Commission decided that while member organization communications to their membership are to be excluded from the definition of "advertisement," political party communications to their members are subject to the advertising disclosure statutes and regulations.
- The Commission decided that the $50,000 threshold from sections 84503 and 84504 is applicable to section 84506 as well.
- Language was changed in proposed regulation 18450.1 from "persons" to "households" to better reflect the distribution methods associated with mass mailings and phone calls, as requested by the Commission.
- Regulation 18450.1 now contains an option with a much broader approach to the definition of "advertisement," to address Commission concerns.
- Communications made via the Internet were specifically excluded from the definition of "advertisement" while the Commission awaits a report from the Bipartisan Commission on Internet Political Practices.

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[1] All references are to the Government Code unless otherwise noted.

[2] The previous memorandum, dated August 31, 2001, contains information regarding the history of these provisions, as well as the statutory construction arguments and previously discussed decision points. That memorandum is available for review.

- The Commission decided not to include language requiring that advertisements containing inaccurate disclosure information be pulled from circulation.
- The Commission agreed that the provisions of Government Code sections 84501-84511 do not apply to slate mailers, as defined in section 84305.5.[3]
- The Commission agreed that the provisions of Government Code sections 84501-84510 apply to recipient committees, as defined in Government Code section 82013(a).

Several issues remain unresolved. Staff has attempted to provide the Commission with a broad range of options on these remaining items. These options are discussed below. In addition, another regulation is presented for your consideration.

Section 84511: Proposition 34, passed in November 2000, added section 84511 which addresses paid spokesperson disclosures in ballot measure advertising. Staff has included a draft regulation regarding this section because there were legislative changes enacted in SB 34 impacting this section. Section 84511 relates to filing and disclosure requirements by any committee when a spokesperson appears in an advertisement and is paid $5,000 or more.

II. ISSUES AND DECISION POINTS.

1. Definition of Advertisement-Regulation 18450.1- {Decision Points 1 & 1a}

Section 84501 defines the term "advertisement," which circumscribes the scope of the advertising disclosure scheme set out in sections 84503-84511 by laying the basic foundation for what is being regulated. This definitional section also contains a subdivision excluding certain items and communications from the basic definition of "advertisement."

In response to Commission concerns regarding the "laundry list" approach to the definition of "advertisement," staff has drafted language, presented in Option 2 of regulation 18450.1, representing a general approach to the definition. Option 1, the "laundry list," has been refined to address issues regarding posters and yard signs so that it is clear that homemade signs and posters are not being regulated. Option 3 is a somewhat shorter, more general version of the "laundry list." The Commission is asked, in **{Decision Point 1},** to decide which among options 1, 2, and 3 is the preferred regulation for defining "advertisement." (See Exhibit 1.)

[3] This issue was raised in the previous memorandum dated August 31, 2001 at page 2. Staff requested that if the Commission did not agree with their interpretation of Judge Karlton's ruling regarding slate mailers in *California ProLife Council PAC, et al. v. Scully, et al.* (1998), 989 F. Supp.1282, we would re-examine the issue and bring it back for further discussion. No objection to staff's interpretation was raised by the Commission at the September, 2001 meeting.

a. Thresholds

{Decision Point 1a} applies to Options 1, 2 and 3, presenting a choice of minimum thresholds to apply in regulating advertising. The choice, as it relates to telephone messages and direct mailings, now refers to "households" because this more accurately reflects the distribution method for those advertisements. The choice of 200 stems from the already-existing definition of a "mass mailing" found in section 82041.5. However, the Commission is not limited to this existing definition. Thus, staff included other options (500 and 1,000) that may be more appropriate in this context because they would present less of a burden on small campaigns and more realistically, represent the numbers found in a political campaign target audience.

b. Internet

At the first pre-notice discussion there was concern expressed regarding the inclusion of the Internet and electronic mail in the definition of "advertisement." It was pointed out that Assembly Bill No. 2720 has established a Bipartisan Commission on Internet Political Practices to examine the application of the Political Reform Act to the Internet. That Commission is scheduled to report to the Legislature by November 2002. Options 1 and 3 now specifically exclude Internet and electronic mail communications from the definition of "advertisement." Staff agrees that it would be prudent to wait until that Commission studies the issues before proceeding to regulate in the area.

c. Section 84511

Regulation 18450.1 specifies that the requirements of the advertising disclosure statutes apply to recipient committees. Staff recommends this approach because these committees "receive" contributions and therefore are the type of committees impacted by these advertisement disclosure statutes. The limitation to recipient committees that is appropriate to sections 84501 through 84510 does not apply to section 84511, because this section applies to committees when they "make" expenditures. Therefore, options 1 and 2 (subdivision (f) of option 1 and subdivision (d) of option 3) exclude section 84511 from the "recipient committee" limitation. However, the "advertisement" definitions in regulation 18450.1 do apply to section 84511.

Staff Recommendation: Staff continues to recommend **Option 1** for its clarity and specificity in offering guidance to the regulated community. There is no staff recommendation regarding **{Decision Point 1a}** at this time.

2. Regulation 18450.2 -Cumulative Contributions. Advertisement Disclosure. What time frame constitutes the "cumulation" period in sections 84503, 84504 and 84508? - {Decision Point 2}

Another interpretive problem presents itself when trying to define and apply section 84502 dealing with "cumulative contributions."

Section 84503 states that only those with "cumulative contributions" of $50,000 or more need be disclosed in ballot measure advertisements. Section 84502 defines "cumulative contributions" as beginning the first day the committee's statement of organization is filed under section 84101. Some recipient committees have been in existence for many years, and may not have amended their statements of organization for quite some time. A literal application of the statute could result in the disclosure of large contributions made many years ago for reasons unrelated to the current advertisement for the current ballot measure. This results in potentially misleading disclosures, actually hiding the identities of the *current* "big money" contributors[4].

This proposed regulation construes section 84502, defining "cumulative contributions" for purposes of section 84503 and section 84508, which references section 84503, and section 84506, dealing with independent expenditures. It does this by creating a framework of specific "cumulation" periods applicable to these statutes. Section 84504 does not use the term "cumulative contribution" anywhere in its provisions. However, it requires identification, in a committee name and in any reference to the committee required by law, of the special or economic interest of its major donors of $50,000 or more. While these other sections (sections 84504 and 84508) do not use the phrase "cumulative contributions," staff believes for continuity, the same definition should apply, as discussed below.[5]

Option 1 (See Exhibit 2) is presented as a literal interpretation of the statutory language, in response to Commission concerns expressed at the September 2001 meeting. This reflects the requirement to begin the "cumulating" period when the committee was first formed, no matter how long ago that might be. The result is that the disclosures required by sections 84503 and 84504 might prove meaningless to the public.

Staff recommends against a literal interpretation of the statutory language due to the possibility that the resulting disclosures would not fulfill the purpose of the statute, as well as the difficulty presented with compliance due to the limited record keeping requirements currently in place. The Court, in *Watson v. FPPC,* (1990) 217 Cal.App.3d 1059, reiterated the well-settled rule that "[t]he literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers." In *Creighton v. City of Santa Monica* (1984) 160 Cal. App.3d 1011, the Court held that "The words [of an initiative] must be read in a sense which harmonizes [them] with the

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[4] For example, consider a general-purpose recipient committee which has been in existence for some time, and which opposed a ballot measure in 1990. A person, *X*, contributed a large amount (more than $50,000) to the committee for the 1990 effort. Time passes, and the committee now wants to place a political advertisement for (or against) a current ballot measure. *X* has not contributed to the committee since 1990, and does not do so now. However, since *X's* earlier contribution is still the largest disclosable contribution to the committee, *X* would have to be disclosed on the current advertisements. Not only is this information unhelpful, it may actually be harmful and misleading because it hides the current "big money" contributors from the public and defeats the purpose of the statute.

[5] Words or clauses may be enlarged or restricted to harmonize with other provisions of an act. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding they convey when used in the particular act. (*People v. Morris* (1988) 46 Cal.3d 1, 249.)

subject matter and the general purpose and object of the amendment, consistent of course with the language itself." In a comprehensive discussion of the canons of statutory construction, the Court, in *Metropolitan Water District of Southern California, et al. v. The Superior Court of Los Angeles County,* (2001) 2001 WL 1230457 (Cal. App. 2 Dist.) noted that, "…consideration must be given to the consequences that will flow from a particular interpretation." The Court said that the final step in statutory construction "…is to apply reason, practicality, and common sense to the language at hand." Staff believes that **Option 2** complies with these canons of statutory construction.

In **Option 2,** subdivisions (1) and (2) of proposed regulation 18450.2, staff has drafted language limiting the time period applicable to the "cumulation" of contributions as it applies to section 84502. This results in a more accurate disclosure to the public. Staff has presented the Commission with a choice of 12 months or 24 months for cumulating contributions **{Decision Point 2a}**. It can be argued that the 24-month time frame seems best suited to "capturing" the information about "big money" contributors. It can also be argued that a 12-month time frame is more consistent with the statutory scheme because such a time frame is set out as mandatory in Government Code section 84506, dealing with independent expenditure disclosures. It was thought that having one time frame for aggregating contributions, regardless of which disclosure section is applied, might simplify the advertising disclosure scheme.

Option 2 works well with the record keeping requirements as outlined in section 84104 and regulation 18401. "Still another 'rule of construction' calls for the harmonizing of statutory provisions, if possible." *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7. Currently, the Commission requires records be kept four (4) years for disclosure purposes. It is possible that a committee might not have records dating back to when the statement of organization was originally filed, making it difficult, if not impossible to comply with section 84502.

Staff Recommendation: Staff recommends **Option 2** because it results in the clearest disclosure to the public while dovetailing with the already-existing record keeping requirements. There is no recommendation at this time on **Decision Point 2a.**

3. Regulations 18402/18450.3 -Committee Name Identification. Advertisement Disclosure. {Decision Point 3}

These regulations focus on identification of a committee for disclosure purposes, as required by section 84504. Section 84504 provides:

> "(a) Any committee that supports or opposes one or more ballot measures shall name and identify itself using a name or phrase that clearly identifies the economic or other special interest of its major donors of fifty thousand dollars ($50,000) or more in any reference to the committee required by law, including, but not limited, to its statement of organization filed pursuant to Section 84101.

> "(b) If the major donors of fifty thousand dollars ($50,000) or more share a common employer, the identity of the employer shall also be disclosed.
> "(c) Any committee which supports or opposes a ballot measure, shall print or broadcast its name as provided in this section as part of any advertisement or other paid public statement.
> "(d) If candidates or their controlled committees, as a group or individually, meet the contribution thresholds for a person, they shall be identified by the controlling candidate's name."

The statute requires that the committee name include identification of the economic or special interest of a $50,000 or more contributor outside the "advertisement" context. This could present a burden on a committee to frequently amend its statement of organization, or where a reference is otherwise required by law, to change the name of the committee. There was discussion at the Commission meeting about the burden on committees in complying with the name identification requirements.[6]

There is also the interpretive question regarding what is meant by the terms "economic" or "other special" interest. In considering the purpose of the statutory scheme it seems that there is an effort to assure that advertising disclosure more accurately reflects the motivation of the parties funding the advertising. Often this is an economic motive, but it can be a social, environmental, or political motive as well. Perhaps the term "other special interest" was designed as a catch-all phrase to assure that somehow the public should be apprised of the interests held by the money behind the advertising, especially when the advertisement itself does not make it clear who the sponsor might be.

Staff provides several options for the Commission to consider regarding the dilemma of defining the "economic" or "other special interest" disclosure. **Option 1** (See Exhibit 3) is no regulation at all. This leaves the area open to interpretation on a case-by-case basis, which may be advantageous. However, this also provides no guidance to the regulated community.

Option 2 amends regulation 18402 (committee names). This option does not attempt to define what is meant by the "economic" or "other special interests" of major donors. It adds to the existing regulation the new name identification requirement and it adds a reference to the name identification requirements already existing for sponsored committees (Regulation 18419). Adoption of this option assures that this new committee name requirement will appear in the already-existing regulation addressing committee names, giving notice to the regulated community of the new requirement. The Commission can consider adopting both **Options 2 and 3**, because they are not mutually

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[6] It was noted that if these requirements were not limited to "primarily formed" committees, political parties, as recipient committees affected by these statutes, would have to change their names to comply with these statutes. Staff has examined this issue and found that, while limiting application of this statute to "primarily formed" committees makes sense from a practical standpoint, there is no existing authority to interpret the statute in this way.

exclusive and may be linked to deal both with the general requirement to name a committee and the issue of "economic or other special interest."

Option 3 creates a new regulation, regulation 18450.3. This option tries to delineate what is meant by an "economic" or "other special interest." This option requires the committee identification somehow relate to the particular ballot measure advertisement in question, to serve the purpose of the statute.[7] This option, in subdivisions 1-2, attempts to lay out specific criteria for the regulated community regarding what must be disclosed if they are a business entity, a labor organization, or a non-profit entity. The criteria are designed to forge a link between the entity's "industry, goal, or purpose," and the specific ballot measure being advertised. The problem with this approach is that the concept may be too multifaceted, and the "real world" too complex to draft comprehensive language fitting every situation.

Staff has no recommendation on these options at this time.

4. Regulation 18450.4-Contents of Disclosure Statements. Advertisement Disclosure. {Decision Point 4} – What should be contained in the actual "disclosure statement" required by sections 84503, 84506, and 84507?

This regulation attempts to assist in the application of sections 84507 and 84511, which outline, in general terms, how the disclosure statement should be presented. Section 84507 states:

> "Any disclosure statement required by this article shall be printed clearly and legibly…and in a conspicuous manner *as defined by the Commission* or, if the communication is broadcast, the information shall be spoken so as to be clearly audible and understood by the intended public…."

Section 84511(b) requires that the spokesperson disclosure appear in "…highly visible roman font shown continuously if the advertisement consists of printed or televised material, or spoken in a clearly audible format if the advertisement is a radio broadcast or telephone message."

This language can be interpreted as allowing the Commission to define both the contents and presentation required of the disclosure statements to assure that the manner in which they are presented is "conspicuous."

[7] For example, suppose R.J. Reynolds qualifies as a major contributor to a committee placing a ballot measure advertisement regarding the purity of cheese. In the minds of many, R.J. Reynolds is part of the "tobacco industry;" such people would expect a disclosure like "tobacco industry" in the committee name. However, R.J. Reynolds also makes macaroni and cheese (it owns Kraft Foods.) The name disclosed should reflect the special interest as related to the specific ballot measure.

The Commission is asked to consider what must be contained in the actual *disclosure statement* relating to ballot measure advertisements. Staff has presented two options for consideration.[8] (See Exhibit 4.)

Option 1 suggests a short "marker phrase" simply identifying who contributed "major funding." While this technically comports with the statute, it does little to present information to the public regarding "big money" and special interests.

Option 2 suggests a longer "marker phrase" which includes the fact that the contributor contributed **{Decision Point 4a}** $50,000 or more, or the exact amount, to the committee placing the advertisement. This statement discloses more information regarding ballot measure financing without being too burdensome on the regulated community.

The regulation goes on to specifically delineate the technical requirements for presenting disclosures in a conspicuous manner, so as to assure that the public can see or hear the disclosure information.

Staff Recommendation: Staff did not have a strong preference regarding these options, and has no recommendation at this time. Staff did not feel there was a great difference between requiring the shorter marker phrase or the longer one. Option 2, however, leaves no uncertainty that "major funding" means donors of $50,000 or more, so it may be more useful to members of the public. For that reason, it is a preferable option.

5. Regulation 18450.5-Amended Advertising Disclosure and Statements of Organization.

Section 84509 requires that advertising be revised to reflect changed disclosure information when a committee files an amended campaign statement pursuant to section 81004.5. Staff has drafted a proposed regulation outlining a timeline within which to amend advertisements to reflect the accurate information.

Proposed regulation 18450.5 (See Exhibit 5) requires certain amendments to both the statement of organization and the advertisements themselves by one of two triggering circumstances relating to other sections in this Act.

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[8] The options presented are simplified versions of those found in the Iowa Administrative Code. (IA ADC 351-4.70(56,68B).) Iowa Code section 56.5 requires different disclosure statements depending on who is paying for the advertisement and how much is being spent. For example, if an advertisement is being paid for by an individual acting independently, and the cost is over $500, the advertisement must contain the words "paid for by" followed by the full name and complete address of the person. If the advertising is paid for by a corporation involved in a ballot issue, but the corporation has not organized a committee because it has not exceeded $500 in activity, the statement shall contain the full name and address of the corporation, as well as the name and office designation of one officer of the corporation. On the other hand, Iowa only requires the phrase "paid for by…" if the advertisement is paid for by the candidate or the candidate's committee.

(a) When a new person qualifies as a major contributor under either section 84503 or section 84506; or
(b) When a new or modified description of economic or other special interest is necessary because of a new major contributor.

Based on input at the interested persons meeting, the regulation requires broadcast advertisements be amended within seven (7) days after the final date for amendment of the statement of organization. This time frame reflects the ability to rapidly change the contents of a disclosure in that particular medium.

This regulation now reflects the concerns voiced at the September Commission meeting regarding the burden presented by requiring amended disclosures on tangible items. The regulation requires amendment of the disclosure to reflect accurate information every time an order to reproduce the items is placed, following the required date the amendment of the statement of organization is filed. A committee can use their remaining stock of an item rather than discarding it.

6. Regulation 18450.11- Spokesperson Disclosure. {Decision Point 5}.

The main issue within this regulation (See Exhibit 6) concerns the question of whether the $5,000 threshold for reporting is a single expenditure or an aggregated expenditure. **{Decision Point 5}.** If the Commission concludes that reporting and disclosure are needed for a single expenditure, the regulated community will know, prior to preparing and airing an advertisement, whether a disclosure is necessary. If the aggregated expenditure option is chosen, this complicates the issue by forcing the regulated community to predict or guess what might be paid to a spokesperson, through future residuals, in calculating and determining whether a disclosure is required in an advertisement. Participants at an interested persons meeting favored the single expenditure approach for its simplicity and clarity.

There was also an issue brought up at the interested persons meeting regarding when an expenditure is made and what impact results on the reporting requirement if an advertisement does not air or run. Section 82025 instructs that "[a]n expenditure is made on the date the payment is made or on the date consideration, if any is received, whichever is earlier." Therefore, when a spokesperson arrives to provide services, the expenditure has been made. Thus the reporting obligation may be triggered regardless of whether the advertisement is ever aired or otherwise distributed. This is reflected in the draft Form 511 (Exhibit 7).

The regulation also addresses the issue of where a report must be filed. Subdivision (d) requires that, in addition to fulfilling the filing requirements in section 84215, committees must also file reports, pursuant to section 84511, with the filing officer who receives original campaign statements filed by committees primarily formed to support or oppose the advertised measure. This assures that the report will be filed in the local jurisdiction where the measure appears.

Finally, the regulation makes it clear that if a committee is subject to the electronic reporting requirements of section 84605(a), any reports filed pursuant to section 84511 must also be filed electronically. Chapter 4 of the Political Reform Act encompasses sections 84100-84511. Section 84511 appears in Chapter 4. Chapter 4.6, encompassing sections 84600-84610, outlines the requirements for online disclosure.

Section 84605(a) requires electronic filing of "[a]ny candidate…committee, or other persons who are required, pursuant to Chapter 4…to file statements, reports, or other documents in connection with a state elective office or state measure…."

Section 84511 requires reporting in connection with "advertisement[s] to support or oppose the qualification, passage, or defeat of a ballot measure…." Thus, section 84511 fits within the definition of who is required to electronically file in section 84605(a).

Exhibit 1-Proposed regulation 18450.1
Exhibit 2-Proposed regulation 18450.2
Exhibit 3-Proposed amendment to regulation 18402
Proposed regulation 18450.3
Exhibit 4-Proposed regulation 18450.4
Exhibit 5-Proposed regulation 18450.5
Exhibit 6-Proposed regulation 18450.11
Exhibit 7-Draft Form 511